

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

M.R., S.J., C.B., D.W., A.B., M.B., An.B, J.B.,
K.S., T.M., A.R., M.J.B., J.H., H.C., THE ARC
OF WASHINGTON, SERVICE EMPLOYEES
INTERNATIONAL UNION HEALTHCARE
775NW and PUGET SOUND ALLIANCE
FOR RETIRED AMERICANS,

Plaintiffs,

v.

SUSAN DREYFUS, in her professional
capacity as Secretary of Washington State
Department of Social and Health Services and
WASHINGTON STATE DEPARTMENT OF
SOCIAL AND HEALTH SERVICES, a
Department of the State of Washington,

Defendants.

No. 2:10-cv-02052-TSZ

EX PARTE MOTION FOR STAY PENDING
APPEAL

NOTE ON MOTION CALENDAR:
Thursday, February 10, 2011.

COMES NOW, the Plaintiffs, by and through their attorneys of record, Andrea Brenneke, and MacDonald Hoague & Bayless, and Stacey Leyton and Altshuler Berzon, and moves this Court under Fed. R. Civ. Pro. 62(c) for an order staying this Court's February 9, 2011 Order denying Plaintiffs' motion for preliminary injunction (Dkt. 171) pending Plaintiffs' appeal of that order. *See* Amended Notice of Appeal (Dkt. 174). In the alternative, Plaintiffs request that this Court issue a 30-day stay of its order to provide the Ninth Circuit Court of Appeals the opportunity to resolve in a more considered manner Plaintiffs' soon-to-be filed motion for emergency stay of this Court's preliminary injunction denial.

Under Rule 62(c), this Court may "make orders appropriate to preserve the status quo

1 while the case is pending in the appellate court.” *U.S. v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79
2 (9th Cir. 1951) (citing *Newton v. Consolidated Gas Co. of New York*, 258 U.S. 165, 177 (1922)).

3 When deciding “whether to issue a stay pending appeal, the court considers: (1) whether
4 the stay applicant has made a strong showing that he is likely to succeed on the merits; (2)
5 whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay
6 will substantially injure the other parties interested in the proceeding; and (4) where the public
7 interest lies.” *Humane Soc’y of the United States v. Gutierrez*, 527 F.3d 788, 789-90 (9th Cir.
8 2008); *see* Wright & Miller, 11 Fed. Pract. & Proc. Civ., §2904 Injunction Pending Appeal (2d
9 ed. 2010) (same standard applies to district court’s evaluation of whether to issue a stay pending
10 appeal under Rule 62(c) as applies to an appellate court’s evaluation of whether to issue such a
11 stay under Rule 62(g) (citing cases)).

12 Because the applicable standard is substantively the same as the standard for a
13 preliminary injunction, Plaintiffs request this stay based on the evidence and arguments
14 previously presented to this Court in briefing and argument on Plaintiffs’ motion for preliminary
15 injunction. *See* Dkt. 95, 155. In addition, the balance of equities and public interest favors
16 Plaintiffs even more so here than in the case of Plaintiffs’ preliminary injunction motion, because
17 granting a stay pending appeal will avoid the possibility that Defendants will send beneficiary
18 notices re-imposing the hours cuts, only to have the Ninth Circuit Court of Appeals again stay
19 the hours cuts in response to a motion for emergency stay pending appeal. Moreover, under
20 Ninth Circuit Rule 3-3, Plaintiffs’ preliminary injunction appeal will receive expedited attention,
21 and should be resolved in a matter of months, whereas trial on the merits in the Court would not
22 likely be resolved until far later. Thus, through this motion for stay pending appeal Plaintiffs
23 request more limited relief than they did in their preliminary injunction motion.

24 Finally, Plaintiffs request that this Court rule on this motion for stay pending appeal as
25 soon as reasonably possible and if at all possible prior to Friday, February 11, 2011. Defendants
26 have informed Plaintiffs’ counsel that Defendants plan to send new notices to personal care
27 service beneficiaries on Friday, February 18, 2011, informing beneficiaries of this Court’s

preliminary injunction denial and re-imposing the hours cuts at issue in this lawsuit. 6th Brenneke Decl. ¶5. As such, if Plaintiffs need to seek an emergency stay from the Ninth Circuit Court of Appeals, it will be necessary to request that such a stay issue no later than Thursday, February 17, 2011. If this Court does not grant a stay, the Ninth Circuit will require adequate time to consider the parties' arguments and rule on the matter; Plaintiffs therefore request a ruling from this Court prior to February 11, 2011 so that an emergency stay application can be filed with the Ninth Circuit, if necessary, and the issue of the stay can be resolved before February 17, 2011 to avoid the unnecessary and additional notices to beneficiaries.

In the alternative, Plaintiffs request that this Court issue a 30-day stay of its order to provide the Ninth Circuit Court of Appeals the opportunity to resolve Plaintiffs' soon-to-be filed motion for emergency stay of this Court's preliminary injunction denial in a more considered manner, avoiding the need for the Ninth Circuit to resolve Plaintiffs' emergency motion before Defendants' planned mailing on Friday, February 18, 2011.

For the foregoing reasons, this Court should stay its February 9, 2011 Order denying Plaintiffs' motion for a preliminary injunction pending appeal of that order, or, in the alternative, issue a stay of that order for 30days.

DATED this 10th day of February, 2011.

MacDONALD HOAGUE & BAYLESS

ALTSHULER BERZON LLP

By: /s/ Andrea Brenneke
Andrea Brenneke, WSBA # 22027
Attorneys for Plaintiffs

By: /s/ Stacey Leyton
Stacey Leyton, CABA #203827
Pro hac vice Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2011, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Andrea Brenneke andreab@mhb.com, jenniferk@mhb.com, julieg@mhb.com, larondb@mhb.com

Edward Joseph Dee edward.dee@atg.wa.gov, cherylc1@atg.wa.gov, corrinnes@atg.wa.gov, kathya@atg.wa.gov

Jonathon Bashford JonB@atg.wa.gov

Regan Rush regan.rush@usdoj.gov

Stacey Leyton sleyton@altshulerberzon.com, croberts@altber.com, ecervantez@altber.com, lkapros@altber.com, mmurray@altber.com, mwatson@altber.com

William Bruce Work brucew@atg.wa.gov, cherylc1@atg.wa.gov, Corrinnes@atg.wa.gov, kathya@atg.wa.gov

William T Stephens bills3@atg.wa.gov, Bstephens@harbornet.com, sharonp@atg.wa.gov

DATED this 10th day of February, 2011.

ALTSHULER BERZON LLP

By: /s/ Stacey Leyton
Stacey Leyton, CABA #203827
pro hac vice Attorneys for Plaintiffs